IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 34

THE SAGE STORES COMPANY, a corporation, and CAROLENE PRODUCTS COMPANY, a corporation,

Petitioners,

—against—

THE STATE OF KANSAS, *ex rel.*, A. B. MITCHELL (substituted as Attorney General),

Respondent.

REPLY BRIEF FOR PETITIONER CAROLENE PRODUCTS COMPANY

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PETITIONERS' REPLY BRIEF.

I.

Constitutionality.

In the consideration of this appeal, nothing could be more illuminating than the following statements in respondent's brief, as to which there is no dispute:

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"The evil that Congress and the Kansas Legislature struck at in 1923, was an adulterated milk product stripped of nutrients and palmed off on the public as the genuine article, thereby affecting the public health and facilitating fraud and deception."

Pages 40-41:

"It is evident that when Congress and the Kansas legislature considered filled-milk in 1923, they were not deceived as to the evil they intended to prevent. They intended to prevent the palming off on the public of an inferior milk compound, stripped of elements essential to the diet of the people and the maintenance of health, and which articles could not be distinguished from the genuine article, and which was actually sold and used by the consumer as and for the genuine article, and not knowing that it did not contain the essentials of it, thereby promoting malnutrition."

Hence it is conceded that the evil which the statute was designed to cure was the "fraud and deception" resulting from "palming off" on the public "*an adulterated milk product stripped of nutrients*" and thereby "*promoting malnutrition*". With the evil intended to be cured thus expressly disclosed, the question is not, as respondent suggests (Brief, p. 53), whether or not there is any "conceivable reason" on which Carolene might have been banned, but whether or not Carolene falls within the reason for which filled-milk *was* banned.

The "nutrients" of which the legislature found filled-milk to be "stripped" were vitamins A and D, which were carried off with the cream in the skimming process.

Accordingly, the question presented may be stated thus:

"Where a statute was passed in 1923 to prevent the palming off of a milk product 'stripped' of vitamins A and D, and subsequently a process is discovered whereby the product can be enriched by the restoration of these vitamins in as great, if not a greater, and in a more constant, degree than they are found in milk itself,

will the statute—particularly since it is a *criminal* statute—be construed to apply to the product compounded by the newly discovered process?.

That question, we submit, answers itself.

The state recognizes this, and, to avoid the obvious answer, it says in its brief (p. 15) that there is an issue as to whether all the nutrients which were absent in the 1923 product are present in Carolene.

True, the Commissioner's findings (44-47, R. 514-15) recognize a disagreement as to the presence in Carolene of certain of the constituents of the butter fat present in milk, but respondent's reference to *that* disagreement is simply a herring drawn across the trail. The constituents as to which this disagreement exists, if there be disagreement at all, are not the nutrients for the deficiency of which in filled-milk that product was banned. Filled-milk was banned because it lacked vitamins A and D; the absence of any other nutrients was not deemed of sufficient consequence even to be discussed, and it only confuses the issue to talk about them. Irrespective of whether or not Carolene contains these other, immaterial constituents, there is no doubt that the nutrients for the deficiency of which the legislature banned filled-milk —vitamins A and D—are found in Carolene in as great, if not greater, and in a more constant, degree than they occur in milk itself. Hence Carolene is not within the rationale of the statute.

Moreover, regardless of the disagreement as to the presence of immaterial constituents in Carolene, the state's reference thereto should not be permitted to becloud the fact that even the state admits (Respondent's Brief, pp. 15-16, 18, 32-33, 35) that if there be any nutritional deficiency in Carolene, that deficiency is of no consequence as to any consumer over the age of about four months. The finding is (53; F. 519):

"When defendant's product is used as a substitute for whole milk or evaporated whole milk *in the diet of infants and children who do not consume a varied diet*, such deficiencies are not made up, and the diet is partially inadequate."

All witnesses are agreed that the human diet becomes varied commencing at the age of about four months (See Respondent's Brief, pp. 32-33).

There is not a word of evidence that even during the first four months' period any child has ever failed to thrive on a compound like Carolene. Petitioners' witnesses, an array of the most prominent pediatricians, nutritionists and chemists in the country, speaking as the result of experience with infant feeding over a period of twenty-five years, testified that Carolene was *at least* as good as milk, even during the first four months of human life. *That testimony is not disputed*: the state's witnesses went no further than to say that in their experiments with *rats*, they found that the animals fared better on a butter fat, than a vegetable oil, compound (R. 313-314, 340-342). In addition to the fact that the rat experiments were scientifically defective (R. 256, 267-8, 366-7, 372, 384, 389, 390-2) is the fact that even the state admits that experiments on lower animals may not be applicable to humans (R. 305). Hence there is no testimony which places in dispute that given by petitioner's witnesses.

However, even if we disregard all the uncontradicted and highly credible proof based on infant feeding, and accept the speculation based on doubtful rat experiments, what is left of the justification for proscribing Carolene? Only the claim that Carolene is not a "complete" food for children up to four months. If that be justification, then every food known to man may be banned, because respondent truly epitomizes all the evidence when it says (Brief, p. 18):

> "* * * Neither whole cows' milk nor any other single food is an adequate source of vitamins. * * * Milk is not a complete food for human beings, since it is deficient in iron, copper, manganese, and vitamin 'D'".

Consequently, if every food which is not a "complete" food may be banned, no food is exempt from proscription.

But, says respondent (Brief, p. 18) milk is "more complete" than Carolene. We have already pointed out that the evidence does not sustain that statement. But what if it did? Since when may a wholesome food be proscribed simply because another is more so? May white bread be banned because whole wheat is more nutritious? May veal be proscribed because beef is more wholesome?

In attempting to justify the prohibition of Carolene, even though it is wholesome and nutritious and harmless, respondent says (Brief, p. 15):

> "A food may be wholesome and nutritious, and harmless in the sense that it is non-toxic, and yet be incapable of sustaining human life for a very long period. It would not be adequate, or a complete food."

The innuendo is that a food product, though wholesome, nutritious and harmless, may be barred if it is not a "complete" food capable of sustaining life "for a very long period". That contention is completely exploded by respondent's own admission, above referred to, that there is no such thing as "complete" food. The findings are that neither milk nor any other single food contains all the elements necessary for an adequate diet (Findings 19, 20; R. 502-3) and that an adequate supply of the essential vitamins may be obtained only by consuming a "varied diet" (Finding 48; R. 515). Thus there is no food, milk included, which, alone, is "adequate" or "complete" or suffi-

cient to sustain life "for a very long period". This being so, there is no justification for banning Carolene simply because it, too, is not, by itself, a "complete" or "adequate" food. It is wholesome; it is nutritious; it is admittedly a good food for everyone over four months of age, and even as to infants below that age,* there is the highest authority for the statement that Carolene is as good as, if not better than, milk and not a word of evidence that a single infant was ever injured by using it. In these circumstances, respondent is unfair in describing our position as the assertion of a constitutional right "of injuring the health of the people" by "fraud and deception" (Brief, p. 43).

There are references in respondent's brief (pp. 39-40) to the debates preceding the enactment of the Federal Filled Milk Act, and extracts are reproduced in which the vitamin deficiencies of filled milk were emphasized. These debates in Congress related to the product as compounded in 1923; the citation of them in discussing the constitutionality of the Kansas statute, as applied to the vitamin-fortified Carolene of today, is hardly calculated to shed light on the present problem. Respondent likewise cites the earlier *Carolene* case in this Court (304 U. S. 144) as establishing "that the rationale of the Federal Filled-Milk Act is not open to judicial inquiry since facts and circumstances, of which the courts can take judicial notice, sustain the legislative judgment of Congress in enacting the law" (Brief, pp. 28-9). That case has no application here; it dealt with

* Respondent's emphasis on the use of Carolene in the feeding of infants should not be permitted to create the impression that Carolene is sold as an infant food. Carolene makes no pretense of being an infant food and is not sold as such. Not a single witness was produced who used it in infant feeding (R. 411-440). Infant foods are bought in drug stores, and generally on doctors' prescriptions; Carolene is sold in grocery stores to "housewives" for "culinary" purposes (Findings 29, 32, 38; R. 507, 509, 511), to be used in preparing food according to recipes distributed with the product and having nothing to do with infant feeding (R. 409-11).

the constitutionality of the Federal Act as applied to the former, vitamin-deficient product, and arose on a demurrer which conceded that the former product was an "adulterated article of food, injurious to the public health". Petitioners do not question the rationale of the statute; they agree with respondent (Brief, pp. 27, 40-1) that the rationale is the prohibition of the sale of a product deficient in vitamins A and D, as the former product was. Applying that rationale to the Carolene of today, it is obvious that Carolene is not within the statute. Carolene is not deficient in vitamins A and D; on the contrary it contains them in as great, if not greater, a degree, and with more constancy, than whole milk itself.

The adoption of filled-milk legislation by other states is relied on by respondent to show that the Kansas statute is not "an arbitrary whim of the legislature" (Brief, p. 25) and the statement is made (p. 62) that the "majority" of the cases have sustained the constitutionality of state laws. In the first place, not all the statutes are alike: some assume to prohibit; others only to regulate. Even though the latter be valid, the former—of which the Kansas statute is one—may be unconstitutional.

In so far as concerns the statement that the "majority" of the cases have sustained the constitutionality of state filled-milk laws, the situation is this: Nine such cases have come before the courts. In three, the statutes have been held unconstitutional (*Carolene Products Co.* v. *Thomson*, 276 Mich. 172; *Carolene Products Co.* v. *Banning*, 131 Neb. 429; *Carolene Products Co.* v. *McLaughlin*, 365 Ill. 62) and in a fourth the statute has been held inapplicable to Carolene, as now compounded (*State ex rel., McKittrick* v. *Carolene*, 346 Mo. 1049). Of the remaining five, two related to the former vitamin-deficient product; these are, accordingly, inapplicable here (*Carolene Products Co.* v.

Harter, 329 Penn. 49; *State ex rel. Carnation M. P. Co.* v. *Ewing*, 178 Wis. 147). That leaves but three: *Carolene Products Co.* v. *Hanrahan* (291 Ky. 417), in which the Court, erroneously we believe, treated the earlier *Carolene* case in this Court as a bar to consideration of the merits, *Setzer* v. *Mayo* (150 Fla. 734), in which both the minority of three and the majority of four agreed that the statute would be inapplicable to Carolene if it were shown that Carolene is as nutritious as milk, and, lastly, this case, also a four to three decision. Thus, there is but little comfort for respondent in the cases previously decided in reference to state filled-milk laws and, as far as concerns the validity of a filled-milk statute in relation to a product like the present day, vitamin-fortified Carolene, there is no justification for the statement (Brief, p. 61) that the doctrine of the cases which held filled-milk legislation unconstitutional has been rejected by the Supreme Courts of Pennsylvania, Missouri, Kansas, Kentucky and Florida.

Respondent cannot be serious in his suggestion that the statute may be justified as one fixing minimum nutritional standards (Brief, p. 43). Clearly, the statute makes no pretense at doing that; it prohibits the sale of every milk product containing a fat other than milk fat, irrespective of how nutritious it may be and regardless of how it would measure up with any other product on a comparison of nutritional values (See our principal brief, pp. 21-2).

II.

"Fraud and Deception".

On respondent's own demonstration (Brief, pp. 27, 40-1), the sale of filled-milk was deemed injurious to public health, and therefore a fraud upon the public, only because filled-milk was deficient in vitamins A and D. The present product is not deficient in either of these constituents; and

it is not injurious to public health. It is, consequently, not a fraudulent product.

Respondent asserts, however, that there is actual fraud in the vending of the product by retailers to whom petitioners sell it (Brief, p. 14). The evidence does not justify that statement, and no finding to that effect was made either by the Commissioner, who heard the evidence, or by the Court below, which reviewed it. All respondent is able to refer to are certain advertisements and the reports of three inspectors. Two of the three inspectors testified to no more than that they saw Carolene "displayed on shelves alongside evaporated milk" (Respondent's Brief, p. 51). Surely a wholesome food product may not be banned for that. The third inspector told of conditions he found in all of twenty-eight stores after two years of investigation throughout the whole of the State of Kansas. His testimony is discussed in our principal brief (p. 25) and need not be reviewed here, further than to say that the only material evidence which he gave is that in "some" of these twenty-eight stores—it might have been in two, for all that appears—the proprietors "recommended" Carolene when the inspector asked for "cheap canned milk". Certainly, a few such incidents in the whole of the State of Kansas in the course of two long years does not establish fraud in the sale of the product (see our principal brief, pp. 25-26). In any event, such instances, rare as they are, could be met by regulation; they cannot justify the flat proscription of a wholesome food product.

Insofar as the advertisements are concerned, respondent says (Brief, p. 51) that "more than 50% of the retail grocery advertisements introduced into the record showed that the product was advertised as 'milk'". Twenty-two advertisements, the earliest appearing on June 17, 1940 (R. 620) and the last on March 4, 1942 (R. 620) were offered in evidence (R. 618-622). It would be difficult to find a

fraction small enough to describe the relation between these advertisements and all that appeared in that period. The fact that in the whole of the state of Kansas, there were six or seven occasions in the course of almost two years on which grocers, without petitioners' knowledge, used the word "milk" in advertising Carolene, does not establish fraud. Such rare advertisements furnish no rational basis for the complete prohibition of the sale of a wholesome food.

Respondent recognizes that the proof falls far short of establishing "fraud" in the sale of Carolene. He seeks to excuse the failure on the ground (Brief, p. 51) that only "a fair sampling of stores was had". There is nothing in the record to explain what respondent means by "a fair sampling". Meagre as it may have been, a "fair sampling" of all the stores in the state of Kansas during a two-year period would, in any event, include vastly more than twenty-eight stores; yet it was only as to that negligible number that the inspector had any comment whatever to make, and the worst he could say of these was that in "some" of them, Carolene was recommended to him when he asked for cheap canned milk.

If a wholesome product may be banned as a fraud on such evidence as that, then practically no article of commerce is immune from proscription.

Respondent fails to distinguish between the sale of a *deceptive* food and the sale of a food *substitute*. Thus, in support of its claim of *deception*, respondent refers to the fact that Carolene is sold as a product which may be used as a *substitute* for milk (Brief, pp. 31, 48-49, 52). Deception is, of course, not permissible, but there is every right, no deception being practiced, to sell a product which may be used as a substitute for another. The distinction was expressly made the basis for holding unconstitutional the oleomargarine statute condemned in *People* v. *Marx*, 99 N. Y. 377.

Respondent's statement (Brief, p. 43), that "the privilege of deceiving the public, even for their own benefit", may not be predicated upon showing that "the false article is as good as the true one", describes no issue presented by this record, and the case respondent cites for the proposition (*Worden & Co. v. California Fig Syrup Co.*, 187 U. S. 516) is readily distinguishable. All that was decided there is that complainant, which sold a product as "Syrup of Figs," would not be granted an injunction against defendant, which sold a product under a similar name, where it appeared that complainant's product, since it was not made of syrup of figs, was "so plainly deceptive as to deprive the complainant company of a right to a remedy by way of injunction by a court of equity." That principle is well settled, but it has no application to the facts of this case. There is here nothing which rises to the dignity of proof of deception of the public; on the contrary, as we have already seen, the most the state was able to prove, after investigation throughout the whole of the State of Kansas during a period of two long years, were a few scattered instances in which grocers had "recommended" Carolene to an inspector who asked for a "cheap canned milk", and six or seven instances in which, without petitioners' knowledge, grocers had used the word "milk" in advertising Carolene. That is not proof that there is such fraud on the public in the sale of Carolene that traffic in it should be flatly and completely banned.

In discussing "fraud and deception," respondent refers (Brief, pp. 47-8, 52) to the fact that petitioners purchase *refined* cottonseed oil for use in compounding Carolene, and the criticism seems to be that *refined* cottonseed oil, being odorless, tasteless and colorless, can be mixed with skim milk without disturbing its natural odor, taste and color. Evidently respondent's point is that petitioners' use of refined cottonseed oil is censurable; that they should shut

their eyes to the palatable ingredient which science has developed and, instead, use a *crude* cottonseed oil, so as to create a product having an odor and a taste which would render it unpalatable! That argument is on a par with the one which follows it (Brief, p. 48), *i.e.*, that Carolene should be proscribed because some of its virtues—rancidity-resistance and whipping properties—are absent in milk and therefore make it more attractive to the public than milk. Such arguments leave one no alternative but to conclude that the issue, in respondent's mind, is not whether or not petitioners have the right to offer the public something better and cheaper than what it has had in the past, but whether or not such an improved product is to be proscribed in order that the dairy industry may be saved from having to compete with it. This appraisal of respondent's position is corroborated by reference to the pages of respondent's brief which are devoted to the statistics of dairy farming in Kansas, and the anticipated dire effects on that business if petitioners and others should be permitted to put skim milk to use in making a product like Carolene (Brief, pp. 20-1, 23, 40). If Carolene is a wholesome product, honestly labeled and sold on its merits, its sale may not be prohibited merely because the dairy industry may suffer from the competition. The quotation from the *Nebbia* case (291 U. S. 502) cited by respondent (Brief, p. 46), to the effect that the legislature may weigh, among others, "economic considerations", does not mean, we submit, that the legislature may stifle one legitimate industry in order to lessen competition for another. In any event, the Congressional debates expressly show that Congress did not intend to "use the dread power of legislation to foster one industry in order to destroy another" (See Record in *United States* v. *Carolene*, No. 21, this term, pp. 1371, 1373).

The oleomargarine cases, which condemn prohibition of a wholesome article of food, are said by respondent (Brief, p.

61), to be inapplicable because "There is no evidence that oleomargarine gets into the channels of infant nutrition as does petitioners' product". The attempted distinction is naive; oleomargarine did get into the same channels as butter, the food for which it could be used as a substitute. Yet, it was decided that if manufactured without fraudulent imitation of butter, and sold without deceit as to its identity, its sale could not be prohibited. The same is true of Carolene.

The "fraud" claim is, in truth, largely beside the point. The statutory prohibition was not enacted on the theory that the sale of *any* milk substitute constitutes fraud; as respondent correctly says (pp. 47, 40-1) the "fraud and deception" which the statute was enacted to prevent is the sale of a product "stripped of nutrients and palmed off on the public as the genuine article, thereby affecting the public health". There is no such fraud in the sale of Carolene; it is not "stripped of nutrients"; it is not unwholesome, and its sale is not injurious to public health. Consequently, it does not fall within the rationale of the statute, and the statute does not apply to it.

For the statement that the legislature may prohibit the sale of an article though truthfully labeled, respondent cites (Brief, p. 44) the cases of *Hebe v. Shaw* (248 U. S. 297), *United States v. Carolene* (304 U. S. 144) and *Mugler v. Kansas* (123 U. S. 623). The *Hebe* case dealt with an "inferior" product (248 U. S. at p. 302); in the earlier *Carolene* case the demurrer admitted that the article was "adulterated" and "injurious to the public health" (304 U. S. at p. 146); the *Mugler* case arose under a statute, passed pursuant to express provision of the state constitution, forbidding the sale of intoxicating liquors—traffic in which the states have unquestionable power to control because of its peculiar properties. Such cases furnish no support for the assertion that a *wholesome* product, *honestly labeled*, may

be banned. As we read the *Weaver* case, it establishes that such a product may *not* be banned.

Respondent says that the legislature may prohibit or regulate, which ever seems to it more reasonable (Brief, p. 44) and seeks to distinguish the case of *Weaver* v. *Palmer*, 270 U. S. 402, which holds the contrary, on the ground (Brief, p. 61) that the *Weaver* case "was one of sanitation against which sterilization adequately protected the public". But the legislature which passed the statute involved in the *Weaver* case had decreed prohibition; it had evidently deemed regulation inadequate to protect the public. This Court held, however, that it was not concluded by the fact that the legislature had deemed prohibition, and not regulation, the proper remedy; that the legislature could not constitutionally *prohibit* the sale of a useful article where *regulation* would be sufficient. That, we submit, is the rule which should be applied here.

CONCLUSION.

The judgment appealed from should be reversed and the petition dismissed.

Respectfully submitted,

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